Lee Hotel Corp. d/b/a Airport Park Hotel *and* Reinaldo Zamora. Case 31–CA–17151

March 25, 1992

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 13, 1989, the National Labor Relations Board issued a Decision and Order in this proceeding,[1] in which it, inter alia, ordered that the Respondent reinstate four employees and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them by the Respondent. On August 30, 1991, Administrative Law Judge Gordon J. Myatt issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Lee Hotel Corp. d/b/a Airport Park Hotel, Inglewood, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

''Pay to the following named discriminatees the amounts opposite their respective names, plus interest accrued thereon to the date of payment as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus income tax withholdings required by Federal and state laws:

Pedro Montero	$13,710.31
Reinaldo Zamora	14,993.18
Danelle Bell-Nagy	16,792.37
Robin Morrow	17,260.29''

Amy Silverman, Esq., for the General Counsel.
Kenneth M. Simon, Esq., of Beverly Hills, California, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge. On September 13, 1989, the Board issued a Decision and Order in this case which required Respondent to reinstate four employees and make them whole for any loss of earnings they suffered as a result of the discrimination found to have been committed by Respondent.[1] Because of a controversy over the amount of the backpay owed, the Regional Director for Region 31 issued a backpay specification on April 10, 1990. A hearing was held in this matter in Los Angeles, California, on June 26 and 27, 1990, at which time the original specification was amended by the General Counsel. (See G.C. Exh. 2 - Amended Appendix ''A.'')

All parties were represented by counsel and afforded opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues in controversy. Briefs have been submitted and have been duly considered.

On the entire record in this matter, including my observation of the witnesses, I make the following

FINDINGS OF FACT

A. *The Issues Involved*

1. Whether the formula utilized by the General Counsel to determine the amount of gross backpay due the discriminatees was appropriate.

2. Whether the amounts calculated as ''tip income'' in the formula utilized by the General Counsel reasonably reflect the tip income the employees would have earned but for the discrimination against them.

3. Whether the discriminatees diligently sought interim employment during the backpay period.

B. *Background Facts*

As noted in the decision in the underlying unfair labor practices case, the facility of the Respondent involved here is located in Inglewood, California. It is situated across the street from the Great Western Forum and is separated by a parking lot from the Hollywood Park Racetrack. The Los Angeles Lakers professional basketball team and the Los An-

[1] 296 NLRB 509 (1989).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's findings regarding the claimants' tip income, we are not unmindful of considerations pertaining to the claimants' contrary income tax disclosures to the Internal Revenue Service. Consistent with *Hacienda Hotel & Casino*, 279 NLRB 601 (1986), and *Original Oyster House*, 281 NLRB 1153 (1986), we shall, therefore, furnish a copy of this supplemental decision to the Internal Revenue Service.

[3] As noted by the judge, the compliance officer made adjustments to the backpay specification that allow for the Respondent's normal slow periods in September and October as they pertain to the hourly tip income of the discriminatees. The judge, however, in calculating the backpay totals inadvertently used the hourly tip income figures from the original backpay specification, i.e., without the adjustments. According to the amended backpay specification in the record, for discriminatee Montero the third quarter hourly tip income figures for 1988 and 1989 should be $5.92, not $6.75; and for discriminatee Bell-Nagy the third quarter hourly tip income figures for 1988 and 1989 should be $12.80, not $16.50. We have modified the recommended Order to provide the correct totals.

[1] 296 NLRB 509 (1989).

geles Kings professional hockey team play their home games at the Forum. In the event either team reaches the playoffs or the championship in their respective sport, the Forum is their home ''court'' or ''ice.'' In addition, concerts and special events, such as the Ice Capades, are held at the Forum. The Hollywood Park racing season occurs twice during the course of a year; once in June and again in December.

The four discriminatees whose backpay is at issue here were the bartenders (Pedro Montero and Reinaldo Zamora) and cocktail waitresses (Danelle Bell-Nagy and Robin Morrow) working in Respondent's bar and lounge. The backpay period set forth in the specification—May 9, 1988, to November 8, 1989—is not in dispute. Nor is the amount of income earned during interim employment and the expenses incurred in earning that income contested here.

C. *The Appropriate Backpay Formula*

It has been long established that the finding of an unfair practice is presumptive proof that some backpay is owed. *NLRB v. Mastro Plastics Corp*., 354 F.2d 170, 178 (2d Cir. 1965). Further, that in a backpay proceeding the burden is on the General Counsel to establish the gross amounts of backpay due the discriminatees; i.e., that which they would have received but for the illegal conduct. *Virginia Electric Co. v. NLRB*, 319 U.S. 533, 544 (1943). If in meeting this burden, it is difficult to determine precisely the amount of backpay due, the General Counsel ''may use as close an approximation as possible and adopt formulas reasonably designed to produce the approximate awards due.'' *NLRB v. Brown & Root*, 311 F.2d 447, 452 (8th Cir. 1963). See also *Trinity Valley Iron Co. v. NLRB*, 410 F.2d 1161, 1177 (5th Cir. 1969). Once the General Counsel has satisfied this requirement, it becomes the Respondent's burden ''to establish facts that would mitigate that liability.'' *NLRB v. Brown & Root*, supra. It is an equally well-settled principle that any uncertainties are to be resolved against the Respondent, as the wrongdoer, and in favor of the employee discriminatee. *NLRB v. Miami Coca-Cola Bottling Co*., 360 F.2d 569 (5th Cir. 1966); *A & T Mfg., Co*., 280 NLRB 916 (1986).

Turning to the issues presented in this case, the compliance officer for the General Counsel testified that he employed formula 2 of the NLRB Casehandling Manual as the appropriate formula to reasonably approximate the backpay due the discriminatees.[2] The stated criteria for utilization of this formula is: ''(a) [It] is especially suitable for situations characterized by changing rates of pay during the backpay period; (b) The (Respondent's) records show hours worked prior to the unfair labor practice in sufficient detail; (c) The business of the (Respondent) is not seasonal; (d) (The) discriminatee was employed by the (Respondent) for a period, prior to the unfair labor practice, sufficiently long to show a typical working pattern; and (e) The backpay period is relatively short and no significant changes were made in hours of work.''

In addition, the Casehandling Manual requires that several other factors be considered when employing this formula. They are:

> 1. Selection of the pre-unfair labor practice typical period must be made to reflect neither excessively high or low hours of work caused by special factors and must be long enough to reflect the discriminatee's typical fluctuation of hours worked.
>
> 2. Overtime hours worked during the pre-unfair labor practice period must be included in the average [hours worked].

According to the testimony of the compliance officer, he used a representative period of 10 pay periods immediately preceding the unlawful discharges. As the discriminatees were paid twice a month, this meant the representative period covered approximately 4-1/2 months. The number of hours worked during the representative period by each discriminatee was divided by five (the number of months in the representative period) to get the monthly average hours worked. This figure was then multiplied by 3 (the number of months in a calendar quarter) and then divided by 13 (the number of weeks in a calendar quarter) in order to ascertain the weekly average of the hours worked by each discriminatee. Based on Respondent's answer to the original specification and further investigation with the discriminatees, the compliance officer amended the backpay specification to reflect the slow periods in Respondent's bar and lounge business for the months of August and September for three of the discriminatees and September and October for the remaining discriminatee. (G.C. Exh. 2.)[3]

Respondent argues that the formula utilized by the General Counsel fails to meet the criteria required by the Casehandling Manual for the application of that formula. Respondent contends the representative period only measures the busy season of its bar and lounge business. By failing to factor in the slow periods of the business, Respondent asserts the formula employed overstates the hours worked and the wages and tips that would have been earned by the discriminatees during the backpay period. Specifically, Respondent argues that the representative period here does not constitute ''an appropriate period of time prior to the unfair labor practice'' nor is it ''long enough to reflect the discriminatee[s'] normal fluctuation of earnings'' as required by the Casehandling Manual. Respondent urges that the appropriate measuring period for determining the hours and earnings is the full calendar year preceding the discharges.[4]

The testimony of all the witnesses clearly establishes that there was a period after the end of the basketball and hockey season at the Forum and the conclusion of the summer racing season at the Hollywood Park Racetrack when Respondent's bar business declined substantially. The area of dispute is whether the slow periods occurred during the months of July through October (as contended by Respondent) or August and September (as contended by the General Counsel and the discriminatees).

---

[2] See generally NLRB Casehandling Manual, pt. 3, sec. 10530.1(c). Sec. 10540 sets forth the application of formula 2, which is described as ''Use of the discriminatee's average hours of work prior to the unfair labor practice.''

[3] The adjustment to the hours worked in the amended specification relate to discriminatee Morrow only. The other adjustments for the slow periods pertain to the tip income for all the discriminatees and is treated subsequently in this decision.

[4] Respondent also argues that the formula used by the General Counsel violates the requirement in the Casehandling Manual that the backpay period be ''relatively short.'' Respondent notes that the backpay period here is for 18 months and contends that it is not ''relatively short.''

Daniel Jones, Respondent's former managing director and currently general manager of a nearby hotel owned by Respondent's parent entity, testified that Respondent's bar and lounge business was heavily impacted by big events at the Forum and Hollywood Park and was not significantly affected by room reservations in the hotel itself. According to Jones, there was a substantial drop in bar business from July through September because there were few big-named events at the Forum and the racing season ended at Hollywood Park in June. Jones stated that $15,000 a month in bar revenue was considered by Respondent to be a better than average month. Jones testified that during the busy months, the basic staffing of the bar consisted of one daytime bartender, one and a half bartenders at night (the daytime bartender working part of the night shift), and two cocktail waitresses. He further testified that during the slow months, Respondent made adjustments in the staffing and the opening and closing hours of the bar and lounge. Thus, according to Jones, Respondent would reduce the number of employees working each shift, reduce the number of shifts, open the bar and lounge later and close earlier, or use any combination of those arrangements.

Sal Moustafa, executive vice president of Respondent's parent corporation and former comptroller of Respondent, testified that Respondent's busy season in the bar and lounge began in November of each year and continued until late June. According to Moustafa, during the busy period, Respondent used two bartenders and one and a half or two waitresses. He stated during the slow months this was reduced to one bartender and one waitress or one bartender only.

Discriminatee Bell-Nagy, the full-time waitress in the bar, testified that the slow months were August and September of each year. She stated that during the slow months she would leave early in order to give the part-time waitress (Morrow) some hours, or if Morrow were not working, she would leave and the bartender would serve the customers.

Respondent introduced into evidence a summary of its monthly bar revenue for the years 1987, 1988, 1989, and the first 5 months of 1990. This summary reveals a substantial drop in bar revenue for the months of August and September in 1987 and 1988 and for the months of August through October in 1989. (R. Exh. 3.)

Based on Respondent's own records and the testimony of Bell-Nagy, which I credit on this point, I find the General Counsel correctly concluded that the slow periods in Respondent's bar business normally occurred during the months of August and September of each year. Therefore, adjustments were necessary to reflect this reduction in hours and earnings in the specification. But the adjustments made here, while affecting the tip income of all the discriminatees, only related to the hours worked by discriminatee Morrow. Because of this, I agree with Respondent and find that the formula, as calculated by the General Counsel, does not present a reasonable approximation of the backpay due the discriminatees. The formula, as applied here, overstates the average hours projected to have been worked by the discriminatees during the backpay period and consequently, also overstates the projected tip income that would have been earned by them.

For this reason I find, in agreement with Respondent, that the weekly average of the hours worked during the full calendar year preceding the unfair labor practices is a more appropriate means of approximating the hours the employees would have worked during the backpay period. There is no indication in the record that Respondent's bar business, nor the hours the employees worked, fluctuated substantially from year to year. Therefore, this average of the weekly hours worked in the preceding year would more accurately approximate the hours that would have been worked during the backpay period, and would take into account the slow months experienced in August and September. Respondent supplied a summary setting forth the hours worked by the discriminatees for the year 1987 and there is no dispute as to the accuracy of this data. (See R. Exh. 4.)

On the basis of the above, the formula utilized by the General Counsel will be altered to reflect the following average weekly hours for the discriminatees for each calendar period:[5]

Pedro Montero	30.16
Reinaldo Zamora	33.67
Danelle Bell-Nagy	26.62
Robin Morrow	20.09

D. *The Discriminatees' Tip Income*

Respondent contends the tip income set forth in the specification grossly overstates the tip income that would have been earned by the discriminatees during the backpay period. Respondent asserts that each of the discriminatees ''unabashedly and freely admitted'' they did not always report tip income on their timecards or when they did, they entered amounts far below that which was actually received. Furthermore, that the discriminatees also admitted they only reported the amounts entered on their timecards when filing their income tax returns with the Internal Revenue Service (IRS); in contravention of the IRS requirement that such income be reported fully. Therefore, according to Respondent, the claim of the discriminatees that they received a substantially larger amount in tip income than reported on their timecards or to IRS must be rejected. Respondent argues that the claim of higher tip income is an admission that the discriminatees violated the Federal income tax laws and such conduct should not be condoned by the Board. In addition, Respondent contends the claim of higher tip income is based solely on the unsupported statements of the discriminatees, which Respondent asserts is unworthy of belief.

The compliance officer testified that he based the hourly tip income of the discriminatees on their written representation of the amount of tips received during the representative period. Montero, the evening bartender, testified he consistently understated the amount of the tips he received when he turned in his biweekly timecard. According to Montero, the patrons of the bar and lounge during the Lakers, Kings, and the Racetrack season were ''big tippers.'' He characterized the customers who attended the big-named special events at the Forum as big tippers as well. Montero stated he averaged approximately $1000 a month in tips, although he acknowledged that he received a lesser amount in tips during the

[5] Because the weekly average encompasses a full calendar year, no further adjustment is necessary to take into account the slow months experienced in Respondent's bar and lounge business.

slow periods of August and September.[6] Of this amount, he more often than not reported an amount of $50 on his timecard. Montero stated that Han Park, Respondent's personnel director, instructed him not to report more than $60 in tips per pay period. Montero also testified that when he received his W-2 forms from Respondent for tax purposes each year, the forms did not allocate any amount for tip income based on Respondent's gross receipts from the bar.[7]

Zamora testified he averaged approximately $200 a week in tips. As in the case of Montero, he stated the tip income was less during the slow months but increased sharply when big-named events occurred at the Forum. Zamora admitted that he grossly underreported his tips on his timecard and arbitrarily stated even amounts on the card. Zamora also acknowledged there were occasions when he did not report any tips on his card because he forgot to do so. This was true even though Park issued a written memorandum to all ''tipped employees'' in June 1987 reminding them to report all tip income on their timecards. (R. Exh. 9.)

Morrow also admitted she did not report the true amount of her tips on her timecard. According to Morrow, she averaged approximately $500 a week in tips. During the slow periods that she worked, Morrow stated she averaged $250 a week in tips. The timecards indicate that Morrow only reported $100 as the amount she received biweekly in tips. Morrow further testified that Respondent never allocated an amount for tips on her W-2s and consequently she never declared the tip income on her tax returns.

Bell-Nagy described Respondent's operation as a ''ridiculously good tip bar'' because the patrons, for the most part, were gamblers with ''no value for money.'' Bell-Nagy stated she received at least $550 a week in tips except for the slow months of August and September. Of this amount, she consistently reported $100 on her biweekly timecard. Bell-Nagy further testified she made it a practice to keep a record of all her tips and gross sales each year until she received her W-2s from Respondent; at which time she would destroy her record. She stated she did this to make certain Respondent did not exceed the 8-percent allocation for tip income required by IRS. According to Bell-Nagy, however, Respondent never made any allocation on her W-2 forms for tip income but included the amount she declared on the timecards as part of her gross wages. Bell-Nagy further stated that when she questioned Respondent's comptroller about this, she was told not to be concerned because she was listed as a ''banquet employee.''

Having observed all the discriminatees during the course of their testimony, I credit their statements regarding the amount of tip income they regularly received at Respondent's establishment. Even though none of the discriminatees produced any written record of tips earned, each steadfastly adhered to his or her statements concerning the amount of tip income generated by the clientele of the bar and lounge. This is true despite the fact that the discriminatees were aware that they were testifying under oath in this proceeding and their statements were a matter of public record which could subject them to possible prosecution and penalties for failing to report their full income to the IRS. See *Original Oyster House*, 281 NLRB 1153 (1986). In addition, I find the calendar of the events at the Forum (G.C. Exh. 5) for the year and a half preceding the unlawful discharges, as well as Respondent's summary of monthly revenue (R. Exh. 3), supports the discriminatees' testimony that the Forum and Racetrack events generated a lively bar business that produced lucrative tips.

As to Respondent's contention that the tip income must be limited to the amount claimed on the discriminatees' timecards and reported on their Federal income tax returns, this argument must be rejected. This same contention was raised and rejected by a Board majority in *Hacienda Hotel & Casino*.[8] There the Board held that while it was not unmindful of (the discriminatee's failure to accurately report her tip income on her Federal income tax returns), it had become a matter of public record in the Board proceeding and a copy of the Board's decision would be forwarded to the IRS. Thus, the Board decided that a discriminatee's failure to accurately report tip income was a matter best left to the IRS. To do otherwise would ''frustrate the purpose of the Act by allowing the Respondent as wrongdoer to benefit from [the discriminatee's] failure to accurately report her income to the IRS.''[9] This rationale was subsequently reiterated by the Board in *Oyster House*, supra at fn. 1. Therefore, the same argument presented here by Respondent must likewise be rejected.

E. *The Interim Employment of the Discriminatees*

Respondent contends that the discriminatees failed to make a diligent search for interim employment during the backpay period and, therefore, sustained a willful loss of earnings which would reduce the amount of backpay each was entitled to receive. Longstanding case law places the burden on Respondent to affirmatively establish that the discriminatees did not exercise reasonable diligence in securing substantially equivalent employment during the interim period. *Kawasaki Motors Mfg. Corp., U.S.A. v. NLRB*, 850 F.2d 524 (9th Cir. 1988); *NLRB v. Mooney Aircraft*, 366 F.2d 809 (5th Cir. 1966); *Colorado Forge Corp*., 285 NLRB 530 (1987); *Rainbow Coaches*, 280 NLRB 166 (1986). On the basis of the record here, I find that Respondent has failed to meet this burden regarding each of the discriminatees.

Montero: The undisputed evidence reveals that very shortly after his discharge, Montero began working at the Stouffers Concource Hotel. Because he worked on split shifts, he was not available to search for employment elsewhere. Montero testified that on the days he was not assigned to work, he remained at home to be ''on call'' in the event he was needed as a replacement at Stouffers. Due to reduction in his income, Montero's wife had to secure employment. As a result, throughout the backpay period Montero continued to work split shifts at Stouffers and subsequent employers in order to care for his children while his wife was at work. The record reveals that Montero was em-

[6] The bartenders not only received tips directly from the customers they served but also from a ''split'' of a portion of tips received by each bar waitress. The amount of the ''split'' depended on the generosity of the individual waitress.

[7] The General Counsel's request that official notice be taken of sec. 6053(c) of the IRS code is granted. This section provides for employer allocation of 8 percent of gross receipts among the employees as tip income.

[8] *Hacienda Hotel & Casino*, 279 NLRB 601 (1986). (Then Chairman Dotson dissenting.)

[9] Id. at fn. 4.

ployed in this fashion for each quarter of the backpay period. (R. Exh. 2(d).)

On the basis of the above, I find that Respondent has not established that Montero did not diligently search for interim employment or that he sustained a willful loss of earnings. To the contrary, Montero was gainfully employed in a similarly equivalent position almost immediately after his unlawful discharge. The fact that he was initially hired to work split shifts and continued to work in this manner, after his wife had to secure a job, in order to care for their children, does not demonstrate a lack of diligence or a willful loss of earnings. Accordingly, Respondent's argument in this regard is without merit.

Zamora: Zamora did not immediately secure another full-time position until early September 1988. He credibly testified that he worked part-time at the Hacienda Hotel and drew unemployment compensation from May to September. He did so because he was hoping to secure a full-time position at the Hacienda. On September 9, Zamora became employed on a full-time basis at a Howard Johnson Hotel, where he remained for the balance of the backpay period. He also continued to work part time at the Hacienda. Thus, the record does not establish that Zamora failed to make a reasonably diligent search for equivalent interim employment or that he willfully incurred a loss of earnings. Rather, he was gainfully employed throughout the entire backpay period, and indeed, held a full-time and a part-time position simultaneously for the great majority of the backpay period. The fact that he was only employed part time from May until September 1988 and drew unemployment compensation does not demonstrate a lack of diligence. The Board looks at the backpay period as a whole and not isolated portions to determine if there has been a diligent search and an effort to secure interim employment. *Colorado Forge*, supra; *Kawasaki Motors*, supra. In view of this, I reject Respondent's arguments concerning Zamora's interim employment and earnings.

Morrow: The record indicates that Morrow worked as a part-time waitress for an employer (Epicurean) that had the bar concessions at the Los Alamitos and Hollywood Park racetracks. As a part-time employee, Morrow was ''on call'' and subject to assignment at either racetrack on a 2- to 3-hour notice. She also had to be available for possible work at the racetracks on the weekends. When she was at Los Alamitos, Morrow worked from 3 p.m. until midnight. At Hollywood Park, her hours were from 10 a.m. until 6 p.m. Morrow testified that she retained her on-call status with Epicurean for approximately 2 years in anticipation of receiving a job as a full-time waitress at the racetrack.[10]

The records submitted by Morrow to the compliance officer disclose that she applied for jobs as a waitress with a number of employers from the time of her discharge until March 1989 without success. (See R. Exh. 1.) At the hearing Morrow also testified that she applied for jobs with other employers, but did not list them because she could not remember their names. In April 1989, Morrow secured a job as a waitress at an establishment called the San Franciscan, where she remained employed until reinstated by Respondent. The record shows that Morrow had net interim earnings of $500.51, $350.23, and $130.25 for the 2nd and 4th quarters of 1988 and the 1st quarter of 1989, respectively.

Respondent contends that Morrow's low level of interim earnings during various portions of the backpay period establish a lack of diligence in searching for interim employment, and demonstrates a willful loss of earnings which should reduce the amount of backpay to which Morrow is entitled. Neither the record evidence nor the case law supports this contention.

First, the case law does not apply the highest standard of diligence to an employee's search for interim employment, but only requires ''reasonable exertions in this regard.'' *Colorado Forge*, supra (and the cases cited therein). See also *Rainbow Coaches*, supra. What is required is ''an honest and good faith effort'' and the ''ultimate test'' is ''whether [the efforts] are consistent with the inclination to work and to be self-supporting.'' *Kawasaki Motors*, supra at 527.

Applying the case law to the facts here, it is evident that Respondent has not established that Morrow failed to engage in a diligent search for interim employment. Morrow secured a waitress position with Epicurean shortly after her discharge and pursuant to the practice followed at that establishment, had to be on-call, with short notice, as a part-time waitress for several years in order to secure a full-time position. The fact that her interim earnings were low during this period does not demonstrate that Morrow was incurring a willful loss of earnings but, rather, that she was putting in the time necessary to secure a full-time position with an establishment she desired. Nor was she completely removed from the job market at this time. By the list in evidence and by her testimony, which I credit, it is evident that she was actively seeking interim employment during the time available to her. Nor does the fact that Morrow could not recall the names of all the establishments she contacted during this period invalidate this conclusion. *Ben Susan Restaurant Corp*., 296 NLRB 997 (1989). That Morrow ultimately secured a position with longer hours at the San Franciscan in April 1989 while still seeking a full-time position with Epicurean—which she received after her reinstatement by Respondent—only serves to further support the conclusion that Morrow actively sought and obtained interim employment.

In sum, I find Respondent has not established that Morrow's efforts to secure interim employment were less than diligent or that she incurred a willful loss of earnings during the backpay period.

Bell-Nagy: The record discloses that Bell-Nagy secured substantially equivalent full-time employment shortly after she was discharged by Respondent and maintained full employment throughout the backpay period. Respondent has offered nothing to refute this evidence. Therefore, it is clear that Respondent has fallen far short of sustaining its burden regarding the interim earnings of Bell-Nagy.

CONCLUSIONS OF LAW

1. The formula utilized by the General Counsel does not reasonably approximate the hours the discriminatees would have worked during the backpay period in this matter.

2. The amount calculated as the rate of hourly tip income for each discriminatee in this matter reasonably approximates

[10] At the time of the instant hearing, Morrow, who had been reinstated by Respondent, left Respondent's employment for a full-time position with Epicurean at the racetrack. According to Morrow, it normally took 2 to 3 years for a waitress to go from part-time to full-time status at the racetrack.

the hourly rate of tip income the discriminatees would have earned during the backpay period.

3. The Respondent has not sustained the burden of establishing that the discriminatees failed to diligently seek substantially equivalent interim employment or that they incurred a willful loss of earnings.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Lee Hotel Corp. d/b/a Airport Park Hotel, Inglewood, California, its officers, agents, successors, and assigns, shall

Pay to the following named discriminatees the amounts of money set opposite their respective names, and detailed in Appendices A–D, plus interest accrued thereon to the date of payment,[12] less income tax withholdings required by Federal and state laws:

Pedro Montero	$14,360.70
Reinaldo Zamora	14,993.18
Danelle Bell-Nagy	18,072.79
Robin Morrow	17,260.29

APPENDIX A

PEDRO MONTERO

YR./QTR.	*HOURLY RATE*	*HOURLY TIP INCOME*	*HOURS PER WEEK*	*WEEKS PER QTR.*	*GROSS BACKPAY*	*INTERIM EARNINGS*	*INTERIM EXPENSES*	*NET INTERIM EARNINGS*	*NET BACKPAY*
1988									
2	$6.59	$6.75	30.16	7	$2,816.34	$1,056.95	$17.50	$1,039.45	$1,776.89
3	,,	6.75	,,	13		1,282.40			
						2,358.78			
					5,230.35	22.60	34.00	3,629.78	1,600.57
4	,,	6.75	,,	,,		95.00			
						1,449.60			
					5,230.35	790.98	- 0 -	2,335.58	2,894.77
1989									
1	,,	,,	,,	,,		1,751.20			
					5,230.35	75.50	- 0 -	1,826.70	3,403.65
2	,,	,,	,,	,,	2,443.16				
					5,230.35	1,202.00	- 0 -	3,645.16	1,585.19
3	,,	,,	,,	,,	1,654.52				
					5,230.35	1,122.59	- 0 -	2,777.11	2,453.24
4				6	2,414.01	1,767.62	- 0 -	1,767.62	646.39
Total Net Backpay:									$14,360.70

APPENDIX B

REINALDO ZAMORA

YR./QTR.	*HOURLY RATE*	*HOURLY TIP INCOME*	*HOURS PER WEEK*	*WEEKS PER QTR.*	*GROSS BACKPAY*	*INTERIM EARNINGS*	*INTERIM EXPENSES*	*NET INTERIM EARNINGS*	*NET BACKPAY*
1988									
2	$6.51	$5.55	33.67	7	$2,842.42	$275.00	$25.00	$250.00	$2,592.42
3	,,	,,	,,	13		300.00			
					5,278.78	839.75	- 0 -	1,139.75	4,139.03
4	,,	,,	,,	,,	5,278.78	3,686.00	- 0 -	3,686.00	1,592.78

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] Interest is to be computed as provided in the Board's Order dated September 13, 1989.

APPENDIX B—Continued

REINALDO ZAMORA

YR./QTR.	*HOURLY RATE*	*HOURLY TIP INCOME*	*HOURS PER WEEK*	*WEEKS PER QTR.*	*GROSS BACKPAY*	*INTERIM EARNINGS*	*INTERIM EXPENSES*	*NET INTERIM EARNINGS*	*NET BACKPAY*
1989									
1					5,278.78	3,609.75	- 0 -	3,609.75	1,669.03
2					5,278.78	3,211.00	- 0 -	3,211.00	2,067.78
3					5,278.78	3,371.25	- 0 -	3,371.25	1,907.53
4				6	2,436.36	1,411.75	- 0 -	1,411.75	1,024.61
Total Net Backpay:									$14,993.18

APPENDIX C

DANELLE BELL-NAGY

YR./QTR.	*HOURLY RATE*	*HOURLY TIP INCOME*	*HOURS PER WEEK*	*WEEKS PER QTR.*	*GROSS BACKPAY*	*INTERIM EARNINGS*	*INTERIM EXPENSES*	*NET INTERIM EARNINGS*	*NET BACKPAY*
1988									
2	$4.43	$16.50	26.62	7		$109.69			
						218.75			
						123.39			
					3,900.10	1,846.15	53.00	2,495.68	1,404.42
3	,,	,,	,,	13	203.00				
						300.00			
					7,243.04	2,500.00	- 0 -	3,003.00	4,240.04
4	,,	,,	,,	,,	1,195.00				
						51.72			
					7,243.04	2,043.55	- 0 -	3,290.27	3,952.77
1989									
1	,,	,,	,,	,,		345.00			
					7,243.04	1,875.00	- 0 -	2,220.00	5,023.04
2	,,	,,	,,	,,		1,362.52			
						67.31			
					7,243.04	2,100.00	17.00	3,790.52	3,452.52
3	,,	,,	,,	,,		4,725.00			
						1,715.50			
						473.76			
					7,243.04	1,250.00	55.00	8,109.26	- 0 -
4	,,	,,	,,	6	3,342.94	3,923.10	- 0 -	3,923.10	- 0 -
Total Net Backpay:									$18,072.79

APPENDIX D

ROBIN MORROW

YR./QTR.	*HOURLY RATE*	*HOURLY TIP INCOME*	*HOURS PER WEEK*	*WEEKS PER QTR.*	*GROSS BACKPAY*	*INTERIM EARNINGS*	*INTERIM EXPENSES*	*NET INTERIM EARNINGS*	*NET BACKPAY*
1988									
2	$4.16	$12.50	20.09	7	$2,342.90	$520.51	$20.00	$500.51	$1,842.39
3	,,	,,	,,	13	4,351.09	1,408.27	25.00	1,383.27	2,967.82
4	,,	,,	,,	,,	4,351.09	380.23	30.00	350.23	4,000.86
1989									
1	,,	,,	,,	,,	4,351.09	170.25	40.00	130.25	4,220.84
2	,,	,,	,,	,,	4,351.09	1,380.00 299.53	20.00	1,360.00	2,991.09
3	,,	,,	,,	,,	4,351.09	3,402.50	- 0 -	3,402.50	948.59
4	,,	,,	,,	6	2,008.20	1,734.50	15.00	1,719.50	288.70
Total Net Backpay:									$17,260.29